No. 12,610

IN THE

United States Court of Appeals

For the Ninth Circuit

Commissioner of Internal Revenue, *Petitioner,* vs. Burnham Enersen and Nina W. Enersen, *Respondents.*	

Brief for Respondents

Henry D. Costigan
Stanley Morrison
Gordon M. Weber
1500 Balfour Building
San Francisco 4, California
Attorneys for Respondents.

McCutchen, Thomas, Matthew,
Griffiths & Greene
1500 Balfour Building
San Francisco 4, California
Of Counsel

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

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INTRODUCTORY STATEMENT

These are petitions filed by the Commissioner of Internal Revenue to review two decisions of the Tax Court of the United States. The taxpayers, respondents herein, are husband and wife, Burnham Enersen and Nina W. Enersen. The sole issue involved is whether the husband was entitled to the benefits of Section 107(a) of the Internal Revenue Code in computing his income tax for 1944 and 1945 upon his distributive shares of certain fees received by the law firm of which he was then and is now a partner. The wife is involved because the said fees

were community property and hence reportable for income-tax purposes half in the husband's return and half in the wife's return (Commissioner's brief, p. 7). It is not disputed that if the husband is entitled to the benefits of Section 107 upon his return, his wife is likewise entitled to the benefits of said Section with respect to the half of the said fees reported in her return.

Accordingly, the two cases involve the same issue and the same material facts. For this reason they were consolidated for hearing and opinion in the Tax Court and the petitions for review are presented to this Court on a single record. For convenience the husband, Burnham Enersen, will be referred to herein as the "Taxpayer" and the wife, Nina W. Enersen, will be referred to as "Taxpayer's wife." We shall discuss only the case of Taxpayer, the husband, except where the wife's situation has particular significance in the argument.

It is also to be noted at the outset that the Commissioner does not question the computations of their taxes made by Taxpayer and Taxpayer's wife in their returns, if Section 107 is applicable, but only questions the applicability of the Section (Commissioner's Brief, p. 7 and especially footnote 6, pp. 7-8). Therefore, if Section 107 is held applicable, the Tax Court decisions that there are no tax deficiencies (R. 77-78) may be affirmed without any need for recomputations.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

We accept the statement on this subject under the heading "JURISDICTION" in the Commissioner's Brief, pages 1-2.

STATEMENT OF FACTS

The facts are not in controversy, having been agreed to by the parties in the Stipulation of Facts (R. 23-31) and the Joint Exhibits 1-A, 2-B, 3-C and 4-D (R. 35-44) incorporated by refer-

ence in Paragraph (7) of the Stipulation (R. 24-5). The Tax Court made findings of fact in which it first found the facts as stipulated (R. 72, first paragraph) and then summarized them in more general form (R. 72-4).

Except for one inaccuracy and one omission, we are satisfied with the Statement of Facts set forth in the Commissioner's Brief under the heading "STATEMENT" at pages 4-8.

The inaccuracy referred to occurs in the description, on page 5 of the Commissioner's Brief, of the agreements about Taxpayer's compensation as employee of the partnership for the period from January 1, 1940, to August 1, 1943. The brief there states:

> ". . . Under these agreements, a minimum salary was guaranteed, and above the guaranteed amount a percentage of net profits was paid. During the years 1940, 1941, 1942, and 1943, up to August first, the taxpayer received the guaranteed salary, plus a percentage of profits at the end of each year. (R. 72-73)"

This passage has the justification of being quoted verbatim from the fourth paragraph of the Tax Court's Findings of Fact (R. 72-3, including the correction of the fourth line from the bottom on R. 72, which was garbled by the printer). However, the underlying stipulated facts, and particularly the written agreements themselves, which were stipulated as Joint Exhibits, are somewhat different and we take it that their terms—which were specifically found as facts in the Tax Court's finding that the facts were as stipulated (R. 72)—will be controlling as against the more general summary of their terms given by the Tax Court Judge. Examination of paragraph 7 of the Stipulation (R. 24-5) and of the Joint Exhibits therein referred to and which also appear in the Record (R. 35-44) shows that instead of being compensated by a salary *plus* a percentage of net profits during this period, Taxpayer was compensated by a share of net profits which, however, was guaranteed to be not less than a minimum annual amount—such minimum amount being paid monthly during the

year and any excess of the percentage of profits over such minimum amount being paid at the end of the year. In this connection, it is also to be noted that during each year of the period the Taxpayer's percentage of the net profits exceeded the minimum annual amount, so that his entire compensation for each such year actually became the specified percentage of net profits (Stip. 7, R. 24-5). The significance of this is, of course, that if the legal fees involved in this case had been received by the partnership ratably over the period during which the services were performed, Taxpayer would necessarily have received his percentage of portions thereof as additional compensation in the earlier years, 1940-43, rather than having it "bunched' 'into the taxable years 1944-5 here involved.

The omission from the Statement of Facts in the Commissioner's Brief, which we believe should be corrected because of its possible importance in the argument, consists of the description of the manner in which the partnership in question treated fees received by it. This description should be inserted in the Statement of Facts in the Commissioner's Brief on page 6 as follows:

> "With certain exceptions not here relevant, all fees and compensation received by the partnership are pooled in a single fund and, after payment of expenses, are divided among those partners and those employees on a profit-sharing basis who had such status at the time of receipt of such fees and compensation, in accordance with their percentages in the month of receipt (Stip. 12, R. 26-7). [Under this arrangement, of course, such persons need not have been entitled to share during the whole prior period of performance of the services for which any such fee is paid.] Conversely, persons who have had a status of partner or profit-sharing employee during part of the period of performance of the services for which the fee is received, but who did not have such status during the month of the receipt of such fee (e.g., partners or employees who retire before

such receipt) do not share in the fee (Stip. 12, R. 27). The procedure outlined in this paragraph was followed at all times involved in these cases (Stip. 13, R. 27). Each of the fees involved in these cases [and referred to in the long paragraph on pages 6-7 of the Commissioner's Brief] was handled in accordance with this procedure (Stip. 14, R. 27.)"

STATUTORY PROVISIONS

The statute which governs the disposition of these cases is Section 107(a) of the Internal Revenue Code as amended by Section 139(a) of the Revenue Act of 1942:

> "(a) Personal Services.—If at least 80 per centum of the total compensation for personal services covering a period of thirty-six calendar months or more (from the beginning to the completition of such services) is received or accrued in one taxable year by an individual or a partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the period which precedes the date of such receipt or accrual."

Relevant to the interpretation of this statute is the wording of the only prior version of Section 107(a) of the Code, as originally enacted by Section 220(a) of the Revenue Act of 1939:

> "In the case of compensation (a) received, for personal services rendered by an individual in his individual capacity, or as a member of a partnership, and covering a period of five calendar years or more from the beginning to the completion of such services, (b) paid (or not less than 95 per centum of which is paid) only on completion of such services, and (c) required to be included in gross income of such individual for any taxable year beginning after December 31, 1938, the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable to such compensation had it been received in equal portions in each of the years included in such period."

SUMMARY OF ARGUMENT

The sole issues involved in this case relate to the interpretation of Section 107(a) of the Internal Revenue Code as applied to the facts presented. It is undisputed that all the requisites expressly set forth in that section have been fully met. The question raised by the Commissioner is whether there should be read into the statute by implication the additional requirement that Taxpayer must have been a member of the partnership for more than 36 months before receipt of the income in question.

Examination of the text of Section 107(a), as well as of its legislative history, makes it clear that Congress gave careful consideration to the legislative policy embodied in the section and to the drafting of its language. Congress laid down in unmistakable terms what the requisites are upon which the application of the section depends. The statute is unambiguous and leaves no room for construction.

The general purpose of Section 107(a) is to alleviate the tax burden which results from the receipt in one year of compensation for services rendered over a period of years. The method of relief is to limit the tax attributable to such compensation to the aggregate of the taxes which would have been imposed if the compensation had been received ratably over the period during which the compensation was rendered.

The only question is what the conditions are upon which the application of the section depends. The conditions specified by Congress are (1) that there must be compensation for personal services covering a period of 36 calendar months or more, (2) that 80% of such compensation must be received in one taxable year, and (3) that it must be received by an individual or a partnership. When these conditions are met the tax computation benefits of the section apply to "any part" of such compensation which is included in the gross income of "any individual."

In this case the compensation in question was required by law to be included in the gross income of Taxpayer (and of his wife as community property) and the Commissioner so included it. "Any individual" includes Taxpayer. Accordingly, Taxpayer is entitled to the benefits of Section 107(a) under the express mandate of Congress.

What the Commissioner seeks to do is to insert in Section 107(a) after the phrase "any individual" the additional and qualifying phrase "who has been a member of the partnership for at least 36 months before receipt of the compensation by the partnership." The Commissioner seeks to do this under the guise of interpretation. But actually Congress has expressed its intent in language so clear that there is no room for interpretation. Thus the Commissioner is really seeking to amend the statute and is asking this Court to encroach on the constitutional legislative power of Congress.

That Congress means what it has said in Section 107(a) is further demonstrated by the legislative history. As originally enacted in 1939, Section 107 was narrower, and its benefits were limited to the taxpayer who actually performed the services for which the compensation was received. But this restriction was eliminated by the Revenue Act of 1942, which drastically revised Section 107(a). Since 1942 the section applies to "any part" of the compensation which is included in the gross income of "any individual." That it is no longer necessary that the taxpayer benefiting from Section 107(a) shall himself have performed the services is expressly recognized in the Report of the Senate Finance Committee as well as in the Income Tax Regulations. In the case of partnership income the legislative intent is now clear that the section applies to a taxpayer who must report the income and who is a member of the partnership at the time the income is received, even though he has not been a member during the entire period over which the services have been rendered.

The Commissioner relies upon the decision of this Court in *Lindstrom v. Commissioner* (1945), 149 F.2d 344. This case arose under the 1939 version of the law and it was properly held that Section 107(a) did not apply to a partner sharing in compensation for services rendered by another partner prior to the formation of the partnership. But since 1942 it has no longer been necessary that the partner reporting a share of the compensation shall himself have performed the services. Hence the *Lindstrom* case is not in point here and affords no support to the Commissioner's position.

Under Section 107(a) it is immaterial whether technically a new partnership was formed when Taxpayer entered the firm. In any event, under California law, the old partnership continued without the formation of a new one.

Even if this Court should hold that Congress intended to benefit only those individuals who had been themselves entitled to share in the fees for a period of 36 months or more, it is enough that Taxpayer in this case for well over 36 months prior to receipt of the fees in question was entitled to share in the partnership profits, either as a partner or, prior to the date of his admission to the firm, as a profit-sharing employee.

The ultimate issue in this case is a fundamental one. Congress has legislated in terms which leave no room for doubt as to its meaning. The Commissioner disagrees with the legislative policy. He seeks to persuade this Court to amend the Internal Revenue Code. He has come to the wrong forum. He should take his complaint to Congress.

ARGUMENT

I

By the Express Terms of Section 107(a) Its Benefits Are Available to Any Person Who Is Required to Include in His Gross Income Any Part of Compensation of the Type Described in the Section, Regardless of His Prior Connection with the Partnership.

A. THIS IS DEMONSTRATED BY THE PRECISE LANGUAGE OF SECTION 107(a) WHICH IS UNAMBIGUOUS AND LEAVES NO ROOM FOR CONSTRUCTION.

Ordinarily a taxpayer making his returns on the cash basis (as did the present Taxpayer) must include in gross income for the taxable year all income received during that year and it is subjected to tax at the rates applicable to such year. By Section 107(a) Congress has provided an exception with respect to compensation for personal services covering a period of 36 months or more. Where the section applies, the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable to the compensation in question "had it been included in the gross income of such individual ratably over that part of the period which precedes the date of such receipt."

The sole question raised in this case is whether the Taxpayer is entitled to the benefits of this provision in the computation of the taxes upon Taxpayer's share of the compensation received by the partnership of which he was a member. The question is a narrow and relatively simple one of statutory construction. The language of Section 107(a) is short and explicit. Congress has laid down in carefully drawn and unmistakable terms what the conditions are upon which the application of the section depends. If these conditions are met, the Taxpayer is entitled to its benefits; if the conditions are not met, the Taxpayer may not claim such benefits. These conditions may not be enlarged or diminished by administrative fiat.

It only remains to consider what the conditions are that Congress has laid down. A reading of Section 107(a) makes it evi-

dent that these conditions are the following and only the following:

1. There must be compensation for personal services covering a period of 36 calendar months or more.[1]

2. 80% of such compensation must be received in one taxable year.[2]

3. It must be received by an individual or a partnership.[3]

When the foregoing three conditions are met, then the tax computation benefits of the section apply to "the tax attributable to *any part* [of such compensation] which is included in the gross income of *any individual*."[4] (Emphasis supplied.)

It is obvious from the record that all of the three conditions above listed are fully met in the present case. The Commissioner admits that all three were fulfilled with respect to the fees involved in this case, saying with respect to such fees in his Statement of Facts (Commissioner's Brief, page 6):

> "During 1944 and 1945, the partnership received fees from clients representing compensation for personal services which had been rendered by the firm over a period of 36 months or more, the amounts received as fees during

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[1]"If . . . compensation for personal services covering a period of thirty-six calendar months or more (from the beginning to the completion of such services) . . ." (Sec. 107(a)).

[2]"If at least 80 per centum of the total compensation [for the services described in note 1 above] is received or accrued in one taxable year . . ." (Sec. 107(a)). Here the word "received" applies to the cash basis Taxpayer and partnership involved in this case.

[3]". . . by an individual or a partnership, . . ." (Sec. 107(a)).

[4]The preceding three footnotes include all of the words used in the conditional or "if" clause of Section 107(a). The remaining words of the subdivision constitute the predicate or main clause reading as follows: ". . . the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the period which precedes the date of such receipt or accrual."

> each year on each case or matter constituting at least 80 per cent of the total compensation therefor."

And see the same admission in his argument, Commissioner's Brief, pp. 11-12. Thus compensation complying with all three conditions was received in each of the taxable years by the partnership of which Taxpayer was a member. For convenience, we may call this "qualified" compensation, i.e. qualified for the benefits of Section 107. Taxpayer's agreed percentages thereof—in the amounts stated on page 6 of the Commissioner's Brief—therefore constituted "parts" of such qualified compensation which had to be "included in the gross income of any individual," i.e., the gross income of Taxpayer (and in that of his wife as to her community property half) and could not have been legally included in the gross income of anyone else. Thus Taxpayer's share of the qualified compensation must be given the benefits of Section 107(a) in his (and his wife's) tax returns, or such benefits will be denied completely with respect to this portion of compensation which falls squarely within the scope of the section.

Any such denial would do gross violence to the intent of Congress and to its express language. This language makes it too clear for question that Congress intends Section 107(a) to apply to *all* compensation of the sort described. Not only is this implicit in the whole sub-section but it is expressed in calculated and carefully chosen words which leave no room for doubt or ambiguity. Assuming the receipt of qualified compensation, Section 107(a) extends "to *any part* thereof which is included in the gross income of *any individual*." These are the key words of the section as applied to this case.

"Any part" includes Taxpayer's part of the compensation in question. "Any individual" includes Taxpayer (or his wife as to her half). Nothing could be clearer. If language like this is not respected, legislation becomes a joke. Congress here has left no

doubt as to its meaning and no room for construction either by the Commissioner or the Courts.

Thus what the Commissioner is asking this Court to do is to amend the Internal Revenue Code—not to construe it. It may be noted that he does not go so far as to contend that Section 107(a) applies only where the taxpayer receiving the compensation also performs the services for which the compensation is paid. (See Commissioner's Brief, pp. 18-19). This position would be impossible in view of the revision of Section 107 made by the Revenue Act of 1942. What he does contend is that an incoming partner may not avail himself of Section 107(a), if he has not been a member of the partnership for 36 months or more at the time of receipt of the fees in question.

Apparently the Commissioner believes that Taxpayer is not "any individual" within the key words of Section 107(a). He could scarcely deny that Taxpayer's community property half of his percentage of the qualified partnership compensation constituted "any part thereof which is included in the gross income" of Taxpayer, because he himself included the same in gross income in his deficiency notice in this case (R. 13-20) and, of course, Taxpayer and the Tax Court did likewise in Taxpayer's computation (Stip. 17, R. 28-31) which the Tax Court approved (R. 74-6 and 77), the only difference between their treatment and the Commissioner's being in the computation of the tax attributable to such part and not in the inclusion thereof in gross income.

Therefore the Commissioner is here seeking to have this Court hold that Taxpayer is not "any individual" as that term is used in Section 107(a) despite the broad and unqualified nature of such term. In other words, the Commissioner is asking this Court to treat the key words of Section 107(a) as if they confined the tax computation benefits of the section to "any part" of the qualified compensation received by a partnership "which is included in the gross income of any individual *who has been a member of*

the partnership for at least 36 months before receipt of the compensation by the partnership." The italicized words are not in the section at all, but the Commissioner wants this Court to insert them by "interpretation."

The legislative character of this change which the Commissioner seeks is indicated not only by the above explanation of his "interpretation" as an insertion of specific words into the statute, but also by his admissions regarding the Tax Court's decision in this case and in the leading case which the Tax Court followed in its opinion, namely,

> *Marshall* (1950), 14 T.C. 90, C.C.H. Dec. 17,456 (reviewed by Tax Court with dissents by 3 of its 16 judges).

Both at page 17 and at pages 25-6 of the Commissioner's Brief it is admitted that these decisions of the Tax Court and the Taxpayer's position in this case are "within a permissible interpretation" of the language of the statute. If so, why should this Court exercise its appellate power—in a case of agreed facts where the power is intended for the correction of clear errors of law—to change that "permissible interpretation" adopted *en banc* by the Tax Court, the recognized expert interpreter of the Internal Revenue Code? Obviously, the Commissioner's Brief is addressed, not to any appellate power of review, but to the power of Congress to change the "permissible interpretation" by amendment.

The legislative character of the change sought by the Commissioner is additionally indicated by its special nature. He concedes that under Section 107(a) it is not necessary that a taxpayer receiving its benefits must himself have performed the services for which the compensation is paid.[1] And there are various

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[1]This concession is necessitated by the express regulation that a partner who shares in the compensation need not have performed any of the services in order to obtain the benefits of Section 107(a), as contained in the Commissioner's Regulations 111, Section 29.107-1, 3rd subparagraph, now in effect, and the corresponding 3rd subparagraph of the prior Regulations 103, Section 19.107-2, as added by Treasury Decision 5220, dated February 2, 1943, and effective on that date.

situations in which an individual may share in compensation for services rendered by others. It is common enough for a partner to share in income received by the partnership for services rendered by other partners or employees. What the Commissioner is doing is to take one special case of this sort—i.e., an incoming partner who shares in fees received subsequent to his admission to membership for services rendered prior to his admission—and to write such a taxpayer out of the statute, while leaving other similar cases within the statute. Furthermore, he undertakes to make the position of this class of taxpayers depend upon compliance with a requirement of membership in the partnership for 36 months or more. Congress, however, made no such requirement. The statute is completely silent with respect to any period of membership in the partnership on the part of the individual who is to benefit from the application of Section 107(a), although the Commissioner's Brief seeks to imply that there is a period-of-membership requirement in his very statement of the question at issue at the commencement of his argument on pages 11-12 of the Commissioner's Brief. It is said there (p. 12) that this question is:

> ". . .—or, stated differently, whether an incoming partner may *tack* on to his period of membership in the partnership the period during which services were rendered by the partnership prior to his admission to the partnership." (Emphasis supplied.)

If the statute did require 36 months' membership by the benefiting partner, a question of "tacking" might be involved, as it is, for example, when it is claimed that the periods of two ownerships may be tacked together in determining the holding period for a long-term capital gain under I.R.C. Section 117. But where no membership period is specified in Section 107(a), it is misleading to state that the question of tacking some prior period on to this

Taxpayer's period of membership in the partnership is here involved.

Whether or not the Commissioner's attempt to insert a 36 months' membership requirement into Section 107(a) with respect to partnership compensation would be wise legislative policy is immaterial. The point is that it constitutes a complete break from the actual language of the Code. If such changes are to be made in the statutes, it is the constitutional function of Congress to make them—not that of the Commissioner or the Courts. The Supreme Court has recently reminded us of this in its decision in

Commissioner v. Korell (1950), 339 U.S. 619.

This case involved the interpretation of Section 125 of the Internal Revenue Code, establishing the deduction for amortizable "bond premium." The question was whether the benefits of the section applied to bonds purchased at a premium occasioned by their convertibility into common stock. The Supreme Court held first that the term "bond premium" was unambiguous and included a premium based on convertibility as well as one based upon the interest rate of the bond. Having adopted this premise, the Supreme Court concluded that the statutory provision must be enforced as Congress had written it, despite the obviously unfortunate tax consequences in the case before it, where the taxpayer had been able to obtain a deduction for what was obviously not a real loss in value in view of his rights under the conversion feature of the bonds. In the course of its opinion, the Court said (p. 625):

> "To be sure, Congress might have proceeded by defining 'premium' (and 'true' premium) rather than, or as well as 'bond.' But we cannot reject the clear and precise avenue of expression actually adopted by the Congress because in a particular case we may know, if the bonds are disposed of prior to our decision, that the public revenues would be maximized by adopting another statutory path. Congress was legislating for the generality of cases."

Before the Supreme Court's pronouncement in the *Korell* case, one could well have disagreed with the premise that the term "bond premium" was unambiguous. This Court itself in the similar case of

Commissioner v. Shoong (1949), 177 Fed.2d 131,

held that "bond premium" was a term requiring interpretation and construed it as including only a "true" bond premium based on the interest rate of the bond and as not covering a premium due to a conversion right. However, the *Shoong* case was reversed by the Supreme Court on the authority of the *Korell* case (*Shoong v. Commissioner* (1950), 339 U.S. 974), and thus it must be taken as established law that the term "bond premium" clearly covers any type of premium, including one due to convertibility. Adopting this premise, no one can quarrel with the Supreme Court's conclusion that the only way in which the adverse effect of the term upon the public revenues should be corrected is by amendatory legislation of Congress.[1]

In our case the key phrase "any individual" is completely free from ambiguity; and the Tax Court recognized that "judicial amendment" would be similarly inappropriate. The Court said (R. 76):

> "Since it is the status of the recipient of the income in the year of receipt, and not either his status in prior years, Federico Stallforth, 6 T.C. 140, nor the indentity of the individual who contributed the services, that is made to govern the application of section 107 in its present form, we are satisfied that under the facts of this proceeding petitioner correctly computed his tax by use of its provisions."

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[1]It is interesting to note in this connection that the legislative correction of the use of the term "bond premium" in Section 125 followed at once after the Supreme Court decisions in the *Korell* and *Shoong* cases. Section 217 of the Revenue Act of 1950, effective with respect to bonds acquired after June 15, 1950, amends Section 125 to provide that: "In no case shall the amount of bond premium on a convertible bond include any amount attributable to the conversion features of the bond."

This decision was in accord with another decision handed down by the Tax Court at approximately the same time. This was the similar leading case already mentioned above,

Marshall (1950), 14 T.C. 90, C.C.H. Dec. 17,456.

The present case is stronger for the taxpayer than the *Marshall* case, as the Tax Court pointed out. It said (R. 75-76):

> "The facts in this proceeding present an even stronger case for the petitioner than did the facts in the Marshall case, because in this proceeding the taxpayer rendered services over a period of several years for which the fees in which he shared, in 1944 and 1945, were paid by clients as compensation for personal services; and, also, he has been associated with the law firm in question throughout the period of years over which he seeks to allocate the income in question."

The Tax Court was clearly correct. If the Commissioner is dissatisfied with Section 107(a) as Congress has written it, he should take his complaint to Congress and not to this Court.

B. THAT SECTION 107(a) MEANS WHAT IT SAYS IS FURTHER DEMONSTRATED BY THE LEGISLATIVE HISTORY.

Where the language of a statute is too clear to leave room for doubt as to its meaning, there is no need to resort to legislative history. However, the history of Section 107(a) affords the strongest evidence that Congress did mean what it said and that there is no justification for writing into the statute specific restrictions that Congress did not choose to put there.

Section 107 originated in the Revenue Act of 1939, was amended by the Revenue Act of 1942, and has not since been changed. On page 5 of this Brief, above, we have separately set forth each of its versions: first the present Section 107(a), as amended in 1942,[1] and then the original 1939 version of Sec-

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[1]Section 107(b) in the 1942 amendment applies to another type of situation and is not here relevant.

tion 107. In addition, a parallel column comparison of the two versions is attached as Appendix A to this brief, in order to show more clearly the many differences between them.

Upon examining the 1939 version it is at once apparent that the benefits of the section then applied only to qualified compensation (i.e., compensation of the required type as to the period of services and the percentage received in one year) which was

> "(a) received, for *personal services rendered by an individual* in his individual capacity, or as a member of a partnership . . . and (c) required to be included in gross income of *such individual* . . . ." (Emphasis supplied.)

The term "such individual" must refer back to the "individual" by whom the services were rendered within clause (a). Thus under this 1939 version, only the taxpayer who had actually performed the services could benefit, although he was not debarred because he had performed them as a partner rather than an individual. It followed that his other partners, if they did not perform any of the services, could not, apparently, use section 107(a). It made no difference whether such other partners were old members or newly-admitted members of the firm.

In the Revenue Act of 1942 Section 107(a) got a drastic overhauling, as shown graphically by the parallel column comparison in Appendix A. The period was reduced from five years to 36 months. The percentage was reduced from 95 to 80. The requirement that the requisite percentage of the compensation be paid only on completion of the services was eliminated. A new requirement was added that the requisite percentage of compensation be received or accrued in one taxable year. Additional changes of wording were made.

The changes mentioned in the preceding paragraph are not directly material to the present controversy, but they serve to show that in drafting the Revenue Act of 1942 Congress gave section

107(a) thorough consideration and that the whole problem of the scope of the subsection was carefully reviewed. It cannot be contended that the job of revision was done in any haphazard way. The same care was unquestionably devoted to the remaining change made in 1942, which is material to the present controversy.

This change is most significant. Under the 1939 version the compensation had to be received for personal services rendered by an individual (in his individual capacity or as a member of a partnership) and was required to be included in the gross income of *the same individual.* The 1942 Act does not contain this requirement that the services be rendered by the same taxpayer who must report the income. It is now provided that wherever "compensation for personal services . . . is received or accrued . . . by an individual *or a partnership,*" the tax computation benefits apply "to *any part* thereof which is included in the gross income of *any individual.*" It is plain that performance of the services by the individual reporting the income was thus intentionally eliminated as a requirement.

It is not surprising that Congress should have made this change. In a normal partnership, services may be rendered by any partner or by employees, yet the compensation is payable to the partnership. It is also usual for each partner to receive a percentage of the total income of the firm. Thus normally a substantial portion of partnership income goes to individual partners who did not perform the services producing the income. Under the 1939 law it followed that only a part of the compensation received by partnerships for services rendered over the requisite period could get the benefits of Section 107. In 1942 Congress decided that such a limitation was undesirable. Accordingly it amended Section 107 so as to afford the same benefits to all compensation of the specified type, regardless of whether the taxpayer reporting the income actually performed all or any of the services.

Congress did this by language too plain to be misunderstood. But in addition the congressional purpose was expressed in the Report of the Senate Finance Committee. That the general intent was to broaden the scope of the relief granted is indicated by the following sentence from the Committee's comments upon the section of the Revenue bill which amended Section 107 of the Internal Revenue Code:

> "It is believed that the use of the term 'five calendar years' results in an inequitable limitation of the scope of such section and that there are also other restrictions in the existing law which prevent a proper application of this relief provision."

Senate Report No. 1631, 77th Cong., 2nd Sess.; 1942—2 Cum. Bul. 585.

More specifically, the Report states (1942—2 Cum. Bul. 586):

> "In order for section 107(a) to be applicable, it is not necessary that the individual who includes in his gross income compensation for such personal services be the person who renders such services. For example, a partner who shares in compensation for such personal services rendered by the partnership may be entitled to the benefits of section 107(a), notwithstanding that he took no part in the rendering of such services. Likewise, in community property States, the spouse of a person who renders such personal services may be entitled to the benefits of section 107(a)."

The elimination of any requirement of participation in the rendition of the services is similarly recognized by the Income Tax Regulations. Regulations 111, Section 29.107-1 contains the following paragraph:

> "It is not necessary, in order for section 107(a) to be applicable, that the individual who includes in his gross income compensation for such personal services be the person who renders the services. For example, a partner who shares in the compensation for such personal services rendered by

> the partnership may be entitled to the benefits of section 107(a), notwithstanding that he took no part in the rendering of such services."

Not only is it unnecessary that the taxpayer reporting the income be the person who renders the services, but it is not even necessary that he be a member of the partnership, *provided* he is an individual in whose gross income "any part" of the compensation in question must be included. This is made clear by the Senate Finance Committee Report in the sentence, quoted above, which states that

> "in community property States, the spouse of a person who renders such personal services may be entitled to the benefits of section 107(a)."

If Section 107(a) applies to a taxpayer who must report the income but is not even a member of the partnership at any time, *a fortiori* the section applies to a taxpayer who must report the income and who is a member of the partnership at the time the income is received, even though he has not been a member during the entire period over which the services have been rendered.[1]

The Commissioner in his Brief (pp. 18-19) attempts to escape from the consequences of the 1942 Amendment by stating that its purpose was merely "clarifying." But the trouble is that Congress has clarified the statute so completely that there is no room left for doubt as to its meaning. This is the fatal weakness of the Commissioner's case. Congress clarified the law by making it plain that it is no longer necessary that the individual who includes in his gross income compensation for personal services be the person who renders the services. Congress made it equally

[1]To be consistent the Commissioner would have to add another requirement to the effect that a wife could not have the benefit of Section 107(a) during the first 36 months after marriage.

explicit that all that is necessary is that the taxpayer be *any individual* who must include in his gross income *any part* of compensation of the specified sort. The Committee Report, in its reference to community property, further makes plain that this means what it says.

What the Commissioner seeks to do is, as we have said above, to write into the plain language of Congress the new requirement that a partner must have been such for 36 months or more, if he is to be covered. This is not "clarification," but complication, confusion and amendment. There is not the slightest justification, other than the Commissioner's own fiat, for attributing any such intent to Congress.

The Commissioner also states (Commissioner's Brief, p. 20) that the conclusion reached by the Tax Court is "contrary to the basic purpose of Section 107." In this connection he quotes from the Senate Finance Committee Report on the Revenue Act of 1939, to the effect that the purpose of Section 107 was to grant relief from the "hardship" falling upon persons "who work for long periods of time without pay." The Commissioner then says:

> "There is no indication whatsoever that Congress, in amending the law in 1942, intended in any way to depart from that basic purpose."

Perhaps it is well to quote in full the paragraph of the 1939 Committee Report from which the Commissioner quotes in part. It reads (Senate Report No. 648, 76th Congress, 1st Session; 1939—2 Cum. Bul. 528):

> "It has been considered a hardship to tax fully the compensation of writers, inventors, and others who work for long periods of time without pay and then receive their full compensation upon the completion of their undertaking. Under existing law, such persons have their income for the whole period aggregated into the final year. This results in two inequities: First, only the deductions, expenses, and credits of the final year are chargeable against the compensation

> for the full period; second, under our graduated surtax, the taxpayer is subjected to a considerably greater burden because of the aggregation of his compensation."

It is common knowledge that the basic reason for the insertion of Section 107 into the Code was the hardship that results from the taxation in a single year of income which is the fruit of work which has been going on for a number of years. The relief is the spreading out of the income over such period of years for tax computation purposes. But this does not answer the question of what taxpayers are entitled to such relief, and the question is not answered in the above-quoted paragraph of the Committee report. The answer must be found in the statute itself. In the 1939 version of Section 107(a) Congress confined the relief to the individual who rendered the services, and the Committee Report was written in the light of that fact.

However, in the 1942 amendment Congress eliminated this restriction of the relief to the individual rendering the services. Hence as far as such restriction may be deemed to have been a part of the basic purpose of Section 107, there is every indication that Congress did intend to depart therefrom in its amendment of 1942. The Commissioner is mistaken in suggesting the contrary.

In the 1942 version Congress made the applicability of Section 107(a) depend, not on who rendered the services, but on who is taxable upon the income. By the explicit terms of Section 107(a), it applies to "the tax attributable to any part" of the compensation. "Any part" would apply to every part and therefore this phrase includes *all* of the compensation. Thus since 1942 it has been the "basic purpose" of Congress to afford the benefits of Section 107(a) to all compensation for sufficiently long-term services when "bunched" by receipt of 80% or more in one year, no matter who must report it. And there can be no fundamental injustice in such a broad legislative treatment of compensa-

tion for long-term services. No greater amount than 100% of the compensation for such services received in a single year can be thereby subjected to the tax computation benefits of Section 107(a) and thus no such benefits can be obtained by any one with respect to any other income than that derived from the long-term services. If the compensation is received by a partnership in a community property state, the aggregate income of all the partners and their wives which is thus entitled to be computed according to Section 107(a) cannot exceed the amount as to which an individual proprietor and his wife would obtain comparable benefits had he alone performed all the services and received all the compensation.

It should be recalled in this connection that the question of who can or must report income consisting of compensation for personal services is rigidly controlled by law. The taxpayer has no option. Compare *Lucas v. Earl* (1930), 281 U.S. 111, and similar cases. This limitation in itself is enough to dispose of the Commissioner's vague contention that to sustain Taxpayer's position "would lead to absurd and unreasonable consequences." (Commissioner's Brief, pp. 25-26.)

Far from being absurd or unreasonable the policy adopted by Congress in 1942 is simple, natural and understandable. Congress was concerned about compensation for long-term services, and it had a choice as between two types of legislation to afford relief from the heavy surtaxes which apply when such compensation for long-term services is "bunched" in a single year. It might have adopted a long and detailed statute differentiating between individuals, between partners of different types, between wives of partners, and employees of partnerships and others.

The fact is, however, that Congress chose the other legislative course. It adopted a broad and general provision classifying as entitled to the benefits of Section 107 all of the parties sharing in the qualified compensation without any limitation or exception.

This had every advantage of both legislative and administrative simplicity. The decision of Congress to adopt this course can be altered only by Congress itself.

C. THE DECISION OF THIS COURT IN LINDSTROM v. COMMISSIONER, 149 F.2d 344, GIVES NO SUPPORT TO THE COMMISSIONER'S POSITION.

The principal authority relied upon by the Commissioner in his argument is the decision of this Court in *Lindstrom v. Commissioner* (1945), 149 F.2d 344. This case, however, affords no support to his position for the simple reason that it arose under the 1939 version of Section 107 and before the 1942 amendment.

The case involved the 1940 taxes of petitioner Lindstrom and his wife, California residents, with respect to Lindstrom's share of a fee received in 1940 by a law partnership in which he and one Eckman were equal partners. Prior to the formation of the partnership Eckman had performed legal services for certain clients over a period of years. The fee for this work was not collected until after the formation of the partnership and accordingly the fee was divided equally between the two partners. At that time the partnership had been in existence for less than five years, which was the period specified in Section 107 as enacted in 1939.

This Court held that under these circumstances Lindstrom was not entitled to the benefits of Section 107 in computing his income tax on his half of the fees in question. The decision was undoubtedly correct, because as the law then stood the benefits of Section 107 were not available unless the taxpayer reporting the income also rendered the services for which the compensation was paid. The Court was careful to point out that the 1939 version of Section 107 was controlling and that the 1942 amendment did not apply. No consideration whatever was given to the question of what the proper result would be after 1942.

The Court did state that the statute had to be enforced as Congress had written it (p. 346):

> "The will of Congress has been plainly expressed in language that does not permit or require a strained or unnatural interpretation. The words of the statute may not be extended or distorted beyond their plain, popular meaning. See Helvering v. Hammel, 311 U.S. 504, 61 S.Ct. 368, 85 L.Ed. 303, 131 A.L.R. 1481; Woolford Realty Co. v. Rose, 286 U.S. 319, 52 S.Ct. 568, 76 L.Ed. 1128."

This statement is just as true of the 1942 version as it was of the 1939 version. And under the Revenue Act of 1942 it is equally clear that Congress intended the opposite result in cases like this. Hence the decision in *Lindstrom v. Commissioner* has no application to years after 1942. All this was clearly recognized by the Tax Court in *Marshall, supra,* which decision was followed by that court in the present case. In the course of its opinion in the *Marshall* case, the Tax Court said (14 T.C. at 92-94):

> "The parties are in apparent agreement that prior to the 1942 amendment respondent's position was the only tenable one. It was in fact so held. *Ralph G. Lindstrom,* 3 T.C. 686. But there the court took pains to point out on affirmance, *Lindstrom v. Commissioner* (C.C.A., 9th Cir.), 149 Fed. (2d) 344, 346, that:
>
> > '. . . The subsequent amendment of this section by Section 139 of the Revenue Act of 1942 does not apply as it relates only to taxable years beginning *after* December 31, 1940.'
>
> "A comparison of the language of the section before and after the amendment demonstrates, however, that emphasis was reversed by the new provision and was removed from the person who renders the services to the person who is required to report the income. That this was intentional appears from the legislative history: . . .
>
> "The fact, therefore, that petitioner could not have participated in the rendition of all of the services involved because he was not connected with the firm during the entire period of service would not of itself deprive him

> of resort to it. . . . Once it is recognized that the requirement of actual participation in the services has been eliminated, we cannot perceive in these facts the inherent absurdity or lack of congressional intent to which respondent's fears are directed."

On page 16 of his brief the Commissioner also cites a memorandum by his own Chief Counsel,

G.C.M. 25795, 1948—2 Cum. Bul. 61.

It seems unnecessary to burden the Court with a discussion of that memorandum. It is apparently cited solely in support of the argument that the *Lindstrom* case applies as much after the 1942 amendment as before and this argument has already been sufficiently covered above. Other points discussed in the G.C.M. are so patently fallacious that the Commissioner's counsel on this appeal have not seen fit to repeat them in their brief. Furthermore, the opinion of government counsel is entitled to no greater weight when expressed in an office memorandum than when expressed in the government brief in this case. Incidentally that memorandum was issued at a time when the present cases were being considered by the Bureau of Internal Revenue and thus cannot be evidence of any administrative practice in effect during the taxable years 1944-5 here involved.

Estate of Sanford v. Commissioner (1939), 308 U.S. 39.

D. TAXPAYER AND HIS WIFE MAY NOT BE DEPRIVED OF THE BENEFITS OF SECTION 107(a) ON THE THEORY THAT A NEW PARTNERSHIP WAS FORMED WHEN TAXPAYER BECAME A MEMBER.

On pages 26-28 of his brief the Commissioner advances the theory that a new partnership was formed when Taxpayer became a member and that for that reason Taxpayer and his wife should be denied the benefits of Section 107(a). The same view was expressed by three dissenting judges of the Tax Court in the *Marshall* case.

The short answer to this point of view is that under Section 107(a) it is immaterial whether a new partnership was formed or not, when Taxpayer became a member. This is demonstrated by the analysis of the statute set forth earlier in this brief in part A. Congress has laid down in unmistakable terms the conditions upon which the application of Section 107(a) depends. There must be compensation for personal services covering a period of 36 calendar months or more, as there was here. Eighty per cent of such compensation must be received in one taxable year, as it was here. Next, the compensation must be received by an individual or a partnership. This condition is undeniably met here. The compensation was received by a partnership and this is just as true whether there was or was not a new partnership formed during the period over which the services were rendered.

The foregoing three conditions being met, Section 107(a) by its terms applies to "the tax attributable to any part [of such compensation] which is included in the gross income of any individual." "Any part" includes the compensation in question. "Any individual" includes Taxpayer and his wife. This is equally true regardless of whether technically a new partnership was or was not formed when Taxpayer became a member. There is no escape unless somebody legislates a change in the statutory language.

The Commissioner's position on this point illustrates once again how he is seeking to legislate, or to persuade this Court to do so, instead of leaving that function to Congress where the Constitution puts it. Congress might have inserted in Section 107(a) an additional condition that the same partnership must have continued in existence for a full 36 months, or for the full period over which the services were rendered. But Congress did not choose to do so and it is easy to understand why not.

Large law partnerships may be taken as an illustration. In such an organization changes in membership occur frequently, per-

haps as often as every year or so. Whether the routine admission of a new partner results in the formation of a new partnership or a mere continuation of the old one depends on the partnership agreement and on state law. The terms of the agreement vary from instance to instance. State law varies from state to state. On identical facts there may be a new partnership in one state and a continuation of the old firm in another state. Yet from a practical point of view it does not matter at all. The difference is a mere legal technicality.

In general, in the drafting of the Internal Revenue Code it has been the point of view of Congress that tax consequences should depend on practical considerations, rather than on the technical variations of state law. It would be most unusual if Congress should have made the application of Section 107(a) depend upon whether or not in the particular instance and in the particular state, the admission of a new partner resulted technically in the creation of a new partnership.

In any event Congress chose not to insert such a requirement into the statute and there is not the slightest justification for reading any such supposed legislative intent into the law under the guise of statutory construction. Congress has laid down the law in clear terms. If the Commissioner believes in a different policy, he should complain to that body.

Furthermore, even if Section 107(a) did require the continuous existence of the partnership throughout the period of services, such is the case here. The Uniform Partnership Act was adopted in California in 1929. That act contemplates the continuity of a partnership despite the admission of new members to it. For example, Section 17 (now to be found in the California Corporations Code, Section 15017) provides that when a person is "admitted as a partner into an existing partnership," he is liable, to the extent of partnership assets, for prior "obligations of the partnership," thus clearly implying the continued existence of the

same partnership. The admission of a new partner is through partial assignments by other partners of their interests; Section 27 of the Uniform Partnership Act (California Corporations Code, Sec. 15027) expressly provides that even a total assignment does not of itself dissolve the partnership, and the admission of a new partner is not a cause of dissolution under Sections 29 and 31. When a new partner is admitted, he is literally admitted *into* the *existing* partnership, which continues in being.

See: *White v. Long* (1927), 289 Pa. 525, 137 Atl. 673.

The continued existence of the partnership after a new member is taken in has been recognized for purposes of federal income taxes. In

Commissioner v. Lehman (CA 2, 1948), 165 F.2d 383,

it was held that for purposes of the forerunner of Section 117 of the Internal Revenue Code the holding period of a partner's interest in a partnership dated back to his entry into the firm even though another partner had been admitted between that date and the time of disposition of the interest. This is completely inconsistent with any view that, under the Uniform Partnership Act, a new partnership is created whenever a new partner is admitted to the firm, and demonstrates that the computation of statutory time periods under the income tax laws is not interrupted by such an event.

Indeed, even a technical dissolution of a partnership, as by the death of a partner, does not prevent the recognition for tax purposes of the continued existence of the partnership if its business is carried on. The tax year of the partnership is not cut short by such a dissolution.

Girard Trust Co. v. United States (C.A. 3, 1950), 182 F.2d 921;

Commissioner v. Mnookin's Estate (C.A. 8, 1950), 184 F.2d 89;

Estate of Isidore Waldman (1950), 15 T.C. No. 80; C.C.H. Dec. 17,918.

And no adjustment to the basis of the partnership assets is required whether or not a dissolution takes place.

Cameron v. Commissioner (C.A. 3, 1932), 56 F.2d 1021;
Ford (1946), 6 T.C. 499; Acq: 1946—2 Cum. Bul. 2.

Likewise there is only one period for the computation of excessive profits under the Renegotiation Act despite a dissolution during the year.

Callahan v. War Contracts Price Adjustment Board (1949), 13 T.C. 355.

All of these cases recognize that the Uniform Partnership Act gives effect in legal theory to the continuity of business adopted in practice. Where, as here, the partnership continued its law practice uninterruptedly and the admission of the Taxpayer to membership was not even a technical dissolution of the firm, there is no justification for treating the case as involving two different firms. This is recognized in practice by the Commissioner inasmuch as no suggestion has ever been advanced to our knowledge that Section 107(a) does not apply to the old partners if a new partner is admitted during the period of services. Yet such would be the result of the argument which the Commissioner tentatively advances for the first time on appeal.

II

Taxpayer and His Wife Are Entitled to Compute Their Taxes Under Section 107(a) Because of His Right for More Than Thirty-Six Months Prior to Receipt of Each Fee to Share in the Partnership Profits.

As set forth above, it is our primary position that Taxpayer and his wife are entitled to the benefits of Section 107(a) regard-

less of whether or not Taxpayer had any connection with the partnership prior to August 1, 1943, the date on which he became a member of the firm.[1] However, if this Court should hold—contrary to what we believe to be the correct interpretation of the statute—that Congress intended to benefit only those individuals who had been themselves entitled to share in the fees for a period of 36 months or more, we further submit that Taxpayer and his wife are nevertheless within the ambit of Section 107(a). This is for the reason that Taxpayer for well over 36 months prior to the date of receipt of any of the fees here involved was entitled to share in the partnership profits, either as a partner or, prior to the date of his admission to the firm, as a profit-sharing employee.

As we have already stated at length, we see no justification for writing into the clear terms of Section 107(a) any new and additional restrictions which Congress itself did not choose to put there. But if there should be any substance at all in the Commissioner's position, we are completely unable to see how anything more could be written into the statute than the requirement that the taxpayer must have been entitled to share in the compensation in question for a period of 36 months or more.

The Commissioner's position is that the Taxpayer here must be entitled to share in the capacity of partner. But assuming the right to share, we are unable to see how, from the legislative point of view, it can conceivably matter whether this Taxpayer's right to a portion of the compensation is based upon his technical status as a partner or upon his contract with the firm as a profit-sharing employee. In either event the basic purpose of Section 107 would be equally applicable. If the actual legal fees involved in this case and which were "bunched" into the taxable years

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[1]As we understand it, that is the sole question involved in the *Marshall* case, cited and discussed at pages 13, 17, 26 above, because the partner there involved became a partner within the period of 36 months and had not previously been on a profit-sharing basis as far as appears from the Tax Court's findings.

1944 and 1945 had, instead, been paid ratably over the periods during which the respective services were performed, this Taxpayer would have received his profit-sharing percentage thereof during the period of more than 36 months from January 1, 1940 to the time of receipt of the fees in 1944 and 1945. This would have been so by virtue of his profit-sharing agreements in effect from January 1, 1940 to August 1, 1943, and by virtue of his partnership percentage thereafter. The purpose of the statute is at least to give a taxpayer in such a situation the same tax benefits that he would have had if the income had been received ratably over the period of the services instead of being "bunched" into a single year, and the continued recognition of this purpose by Congress would prevent any amendment of the statute to eliminate this Taxpayer's case merely on the ground that he was not technically a partner.

The Commissioner seems to feel that since the Taxpayer had been fully paid his specified percentage of net profits under his employment agreements with the partnership prior to the period when he became a partner, this furnishes a further ground for differentiation between his case and the case of one who had been a partner during the whole period from and after January 1, 1940 (see Commissioner's Brief, pp. 22-23). It is true that if Taxpayer had retired from his job at the end of his period of employment on the profit-sharing basis, i.e., August 1, 1943, instead of becoming a partner on that date, he would not have been entitled to share in any fees subsequently received, and thus would not have had any right to any portion of the compensation received in 1944 and 1945, which is here involved. However, in this respect his situation would be no different whatsoever from that of a partner who had been a member of the firm during the period from January 1, 1940 to August 1, 1943, but who retired on the latter date. Under the stipulated practice of the partnership here involved, such partner likewise would have been fully

compensated by his percentage of fees received during the period prior to August 1, 1943, and would not have been entitled to any share of fees received in 1944 or 1945 (Stip. 12-13, R. 26-27). Thus there is not any distinction of substance in this respect between a partner and a profit-sharing employee.

And in any event the fact remains that either a partner or a profit-sharing employee who had been such during the period from January 1, 1940 to August 1, 1943 and had thereafter been a partner until the end of 1945, would have received his taxable income under lower surtax rates during the years 1940-43, inclusive, if the fees here in question had been paid ratably over the period of performance of the services. Thus either is entitled to the benefits of Section 107(a) under any fair interpretation of its purpose.

CONCLUSION

The distinction mentioned above, which the Commissioner would make between the right existing for 36 months or more to share in compensation, on the one hand as a partner and on the other hand as a profit-sharing employee, brings out once again the legislative character of the Commissioner's views.

Assuming compensation of the specified sort, Congress has provided in clear and simple terms that Section 107(a) applies "*to any part thereof which is included in the gross income of any individual.*" The Commissioner would strike these words from the statute. He would substitute complicated provisions under which some individuals who are included within the actual language of Congress would remain within the scope of Section 107(a), while others would be excluded. He admits that not every taxpayer who benefits must have rendered the services for which the compensation is paid. But some taxpayers who did not render services are to be excluded. No guiding line of distinction having been provided by Congress, the Commissioner would himself supply it—or have this Court do so. The line of

distinction which he selects is between partners who have been such for 36 months or more and other taxpayers who equally are within the class actually described in Section 107(a). Also, he would draw a distinction between those entitled to share in compensation as partners or as profit-sharing employees.

The mere statement of distinctions like this, of which no suggestion can be found in the actual language of Congress, is sufficient to reveal that this is new legislation—not interpretation.

Whether or not taxpayers in this situation have to pay somewhat more or less income tax is not a matter of great public importance. But it is of critical public importance that our constitutional system of government be preserved. It is of critical public importance that the legislative powers of Congress be protected from encroachment by the other branches of government. To afford such protection is a basic function of this Court. That is the ultimate issue in this case.

Respectfully submitted,

HENRY D. COSTIGAN
STANLEY MORRISON
GORDON M. WEBER
1500 Balfour Building
San Francisco 4, California
Attorneys for Respondents.

MCCUTCHEN, THOMAS, MATTHEW,
GRIFFITHS & GREENE
1500 Balfour Building
San Francisco 4, California
Of Counsel

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(Appendix follows)

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